UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD BALDWIN, and LAURA BALDWIN

Plaintiffs,

vs. Case No.: 14-cv-02346-WJN

MONTEREY FINANCIAL SERVICES, INC.

Defendant.

DEFENDANT MONTEREY FINANCIAL SERVICES, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

I. INTRODUCTION

Defendant Monterey Financial Services, Inc. ("Monterey") submits this Memorandum of Law in support of its Motion for Reconsideration of the Court's September 30, 2016 Order granting in part and denying in part Monterey's Motion for Summary Judgment (Doc. 39). Specifically, Monterey seeks reconsideration of the Court's decision as it relates to Plaintiffs Richard and Laura Baldwin's ("Plaintiffs") first cause of action, alleging that Monterey violated the Telephone Consumer Protection Act ("TCPA") and on reconsideration an order dismissing Plaintiff's first cause of action.

II. PROCEDURAL HISTORY

On September 15, 2015, Monterey filed its motion for summary judgment (Docs. 14-16). On October 26, 2015, Plaintiffs filed their opposition to Monterey's motion for summary judgment (Docs. 20-21). On November 11, 2015, Monterey filed its reply papers in further support of its motion for summary judgment (Docs. 23-24). On December 9, 2015, Plaintiffs filed a motion for leave to file a surreply and supporting brief, (Docs. 28-29), which was opposed by Defendant. (Doc. 31). Plaintiffs' motion to file a surreply was granted by the Court, and Plaintiffs' surreply was subsequently filed. (Docs. 35, 36). Thereafter, Monterey then filed a reply to the surreply. (Doc. 37). On September 30, 2016, the Court issued its Memorandum of Decision and Order granting in part and denying in part Monterey's motion for summary judgment. (Docs. 38-39). Monterey now moves for reconsideration of this Memorandum of Decision and Order as it relates to Plaintiff's first cause of action, alleging that Monterey violated the TCPA.

III. ARGUMENT

A. LEGAL STANDARD

A motion for reconsideration is governed by Rule 59(e). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Argentum Med., LLC v. Noble Biomaterials*, No. 3:08-CV-1305, 2010 WL 3749274, at *2 (M.D. Pa. Sept. 21, 2010) (citing H*arsco*

Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir.1985). "[R]econsideration motions may not be used to raise new arguments or present evidence that could have been raised prior to the entry of judgment." *Hill v. Tammac Corp.*, Civ. A. No. 05–1148, 2006 WL 529044, at *2 (M.D.Pa. Mar. 3, 2006). However, "[a]s we have previously emphasized, reconsideration is the appropriate means of bringing to the court's attention manifest errors of fact or law. *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 678 (3d Cir. 1999) (citing *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985)).

Here, it is respectfully submitted that the Court's Order relied on a clear error of law when it ruled that an issue of fact exists as to whether the Plaintiffs revoked their prior express consent to be contacted by Monterey. Specifically, the Court has overlooked well-settled case law (some of which was decided after Monterey moved for summary judgment) that revocation requires an affirmative act that clearly expresses a desire not to receive further phone calls. Contrary to the Court's decision, revocation cannot be based on a series of independent acts and must include a measure of clarity not found in the instances cited by the Court in ruling that an issue of fact exists.

B. THE COURT'S PRIOR DECISION IS BASED ON A MANIFEST ERROR OF LAW

Relevant to the present motion is the Court's denial of Monterey's motion for summary judgment on Plaintiffs' first cause of action and its finding "that, based on the summary judgment record, there is a genuine issue of material fact as to when Plaintiffs revoked their consent for Defendant to call their cellular telephones." (Doc. 38, at p. 18). In finding a genuine issue of material fact, the Court reasoned as follows:

> In particular, a reasonable jury could find that Plaintiffs manifested that they no longer consented to be contacted on their cellular telephones as a result of any one of the following communications separately or taken together: on August 25, 2013, Plaintiffs sent email correspondence to Prestigious in an attempt to cancel the agreement, (Doc. 15, pp. 4-5); (Doc. 20-2) (Plaintiffs directed Prestigious to destroy "any documents that contain our personal and confidential information"); (Doc. 21, pp. 3-4); (Doc. 24, p. 1); on August 26, 2013, Plaintiffs mailed a letter to Prestigious in an attempt to cancel the agreement, (Doc. 15, p. 5); (Doc. 21, p. 4); on September 9, 2013, Richard Baldwin told Defendant that the account was cancelled, that Prestigious refused to cancel the contract, and that Defendant should contact his attorney, Richard Day, regarding the matter, (Doc. 21, p. 7) (citing Doc. 20- 1, p. 2; Doc. 20-7); see (Doc. 15-2, p. 28) (Richard Baldwin told Defendant to "Talk to my attorney about this, okay."); on September 13, 2013, Richard Baldwin told Defendant his account with Prestigious had been cancelled, (Doc. 21, p. 7) (citing Doc. 20-1, p. 4); on September 17, 2013, Defendant spoke with Plaintiffs' attorney, Richard Day, who said that Plaintiffs sent a letter cancelling the contract, (Id.) (citing Doc. 20-1, pp.

> 4-5); on October 17, 2013, Defendant marked the account as, "Refusal to Pay," after discussing the matter with Richard Baldwin. (Id. at p. 8) (citing Doc. 15-2, p. 41-42; Doc. 20-1, pp. 6-8); see (Doc. 15-2, pp. 40-41). Further, on a number of occasions, Plaintiff immediately hung up after answering a telephone call placed by Defendant. (Doc. 21, pp. 9-10).

(Doc. 38, at pp. 18-19). As discussed below, however, this reasoning is based on a flawed application of well-settled case law on the issue of revocation of consent.

Once given, "consumers may revoke consent ***in any manner that clearly expresses a desire not to receive further messages***, and that callers may not infringe on that ability by designating an exclusive means to revoke." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7997 (2015) (emphasis added); *see also Galbreath v. Time Warner Cable, Inc.*, 2015 WL 9450593, at *3 (E.D.N.C. Dec. 22, 2015).

Revocation of prior consent, however, requires an "***affirmative act to revoke*** any prior express consent." *Steinhoff v. Star Tribune Media Co., LLC*, 2014 WL 1207804 (D. Minn. Mar. 24, 2014) (emphasis added); *Van Patten v. Vertical Fitness Grp., LLC*, 22 F. Supp. 3d 1069, 1075 (S.D. Cal. 2014) ("[T]he mere end of the subscription didn't terminate the consent that came with providing the phone number in the beginning, especially absent any affirmative act to revoke the consent."); *Cunningham v. Credit Mgmt., L.P.*, 2010 WL 3791104, at *5 (N.D. Tex. Aug. 30, 2010), *report and recommendation adopted*, 2010 WL 3791049

(N.D. Tex. Sept. 27, 2010) ("Plaintiff's statement that phone calls are inconvenient is insufficient to revoke his prior express consent."). Said another way, "***the TCPA requires—at a minimum—express and clear revocation of consent; implicit revocation will not do***." *In re Runyan*, 530 B.R. 801, 807 (Bankr. M.D. Fla. 2015).

Here, as quoted above from its decision, the Court's reasoning is based on one of four categories of communications: (1) an attempt to cancel the agreement; (2) refusing to pay on a contract; (3) requesting that Monterey speak to an attorney; and (4) hanging up when called. However, relevant case law overlooked by the Court in denying Monterey's motion for summary judgment, demonstrates that each of these examples is insufficient to constitute revocation of express prior consent.

As stated above, the well-settled case law, ignored by the Court in denying Monterey's motion for summary judgment on Plaintiffs' TCPA claim, provides that revocation of consent requires an affirmative act on the part of the party being called that clearly expresses revocation. By way of example, in a decision issued earlier this year, and after Monterey made its motion for summary judgment, the United States District Court for the Southern District of Florida, analyzing the 2015 FCC Ruling, granted summary judgment in favor of the defendant, holding that "Plaintiff's statements—considered as either a request to stop all calls or only calls during certain times—were ineffective to revoke consent." *Schweitzer v.*

Comenity Bank, No. 9:15-CV-80665-DMM, 2016 WL 412837, at *4 (S.D. Fla. Jan. 28, 2016). In coming to this determination, the Court reasoned as follows:

> Applying the standard articulated in the 2015 FCC Ruling, Plaintiff has not demonstrated she "clearly express[ed] ... her desire not to receive further calls" where she attempted to limit the timing of the calls. After consent to receive phone calls is provided to a caller under the TCPA, the recipient (or called party) must revoke the consent clearly. A called party who asks not to be called "during lunch" or "during my pedicures on Saturday" is not asking not to be called. Rather, she is asking not to be called at inconvenient times, without specifying what those times are. Here, ***Plaintiff did not clearly convey to Defendant a desire not to receive further calls and thus did not effectively revoke her consent under the FCC's standard.***

Id. at *5 (alterations in original) (emphasis added) (quoting *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7997 (2015)).

Similarly, in *Runyan*, the court determined that the debtors had not revoked consent, reasoning as follows:

> At best, the Runyans implicitly revoked their consent here. Mr. Runyan testified at trial that he told Green Tree it could contact his attorney with any further questions. Later, in response to an overtly suggestive question by the Trustee's counsel, Mr. Runyan explained that in doing so he intended to revoke his consent to Green Tree's autodialed phone calls. But when asked point-blank on cross-examination whether he plainly told Green Tree to stop making calls to his cell phone, Mr. Runyan conceded he did not.

In re Runyan, 530 B.R. at 807. The court further held, "***[o]rally revoking consent to autodialed cell phone calls is not a tall task. But it does require a measure of clarity***, which the Runyans have not shown. For these reasons, the Runyans have failed to establish a violation of the TCPA." *Id.* at 807.

Finally, in *Dixon v. Monterey Financial Services, Inc.*, 2016 WL 3456680 (N.D. Ca. June 24, 2016), the district court, faced with a similar situation, found that "[a]lthough the referenced comments indicate plaintiff either had or intended to retain counsel to respond to defendant's inquiries regarding plaintiff's debt, ***plaintiff did not use any language that would cause defendant to know, or have reason to know, she was revoking her prior express consent to be called***."

The examples offered by the Court in its decision denying Monterey's motion for summary judgment on Plaintiffs' first cause of action are not instances where Monterey knew or had reason to know that consent was being revoked. Like in *Schweitzer*, *Runyan* and *Dixon*, Plaintiffs failed to make any affirmative statement that would cause Monterey to know that consent was revoked. Certainly, there was no clarity on the part of Plaintiffs when hanging up, refusing to pay a debt, or trying to cancel a contract it has no legal right to cancel. Accordingly, the Court should reconsider is denial of Monterey's motion for summary judgment on Plaintiffs' fist cause of action.

Further, the Court's reasoning, if not reconsidered, that refusing to pay a debt is equal to revocation would turn the debt collection industry on its head. Put simply, a large proportion of debtors subject to collections refuse to make payments (at least initially). To correlate this refusal to revocation, however, runs contrary to the above-discussed case law, requiring clarity and certainty.

Finally, and perhaps most importantly, the Court has suggested that taking all of the instances cited by Plaintiffs as a whole could amount to revocation. This is manifest error or law. As set forth above, revocation requires an affirmative act that clearly demonstrates revocation and cannot be measured on the totality of the circumstances. It is certainly not the case that a series of events spanning several months, none of which on their own constitute revocation of consent, could provide Monterey knowledge, or have reason to know, Plaintiffs were revoking her prior express consent to be called.

IV. CONCLUSION

The decisional authority cited by Monterey and the relevant FCC Declaratory Rulings demonstrate that the Court needs to correct manifest errors of law in its denial of Monterey's motion for summary judgment. For these reasons, the Court should grant Monterey's motion for reconsideration and on reconsideration, grant Monterey's motion for summary judgment and dismiss Plaintiffs' first cause of action.

DATED: October 20, 2016

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CERTIFICATION OF WORD COUNT

Pursuant to Local Rule 7.8(b)(2), the undersigned verifies that using the Microsoft Word "word count" tool, the word count for Defendant, Monterey Financial Services, Inc.'s Memorandum Of Law in Support of its Motion for Reconsideration is 2,061 words. This word count does not include the Certificate of Service, the signature lines, or the captions.

s/ Brendan H. Little
Brendan H. Little

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2016, I electronically filed the foregoing Memorandum of Law in support of the Defendant's Motion for Reconsideration via the CM/ECF system, which should then send notification of such filing to all counsel of record.

s/ Brendan H. Little
Brendan H. Little